

TORT LIABILITY OF THE MENTALLY ILL AND MENTALLY DEFICIENT

WILLIAM J. CURRAN*

A great amount of attention has been given in our courts and legal literature to the criminal responsibility of persons suffering from mental disease. There has been very little examination of the tort responsibility of such persons. This paper is presented as an examination of the existing case law in this field with a critique of that law based on an analysis of modern psychiatric classifications of mental illness and mental deficiency.

THE EXISTING LAW

According to the text-book¹ and law-review² commentators and annotators³ it is becoming settled law in the common law jurisdictions⁴ of the United States that *insane persons* are fully responsible for their torts with the possible exception of those actions requiring a special intent or malice. This development is sustained in an almost unbroken, though sparse and often badly reported, line of cases since early in the Nineteenth Century. It is also statutory law in five states.⁵

For many years the clear trend of the cases was resisted by the commentators who thought the decisions violative of the fault principle in tort law.⁶ This group dominated in the early drafts of the *Restatement of Torts*. In the sections on intentional torts, the problem of the mentally ill actor is ignored. In negligence, the key section concerns the standard of the reasonable man. As adopted in

* Professor of Legal Medicine and Director, Law-Medicine Research Institute, Boston University; Lecturer on Legal Medicine, Harvard Law School.

¹ Prosser, *Torts* 791 (2d ed. 1955).

² Ague, "The Liability of Insane Persons in Tort Actions," 60 *Dick. L. Rev.* 211 (1955); Wilkinson, "Mental Incompetency as a Defense to Tort Liability," 17 *Rocky Mt. L. Rev.* 38 (1944).

³ Note, 34 *Cornell L.Q.* 274 (1948); Annot., 51 *A.L.R.* 833 (1927); 89 *A.L.R.* 476 (1934); 28 *Am. Jur.*, "Insane and Other Incompetent Persons" §§ 93-101; 44 *C.J.S.*, "Insane Persons," §§ 122-126.

⁴ Louisiana follows the Civil Law rule of no liability. See *Yancey v. Maestri*, 155 So. 509 (La. App. 1934). The decision contains a full discussion of question and cites very adequately the foreign law on the subject.

⁵ Cal. Civil Code § 41 (1954); Mont. Rev. Code tit. 64, § 113 (1947); N.D. Rev. Code tit. 14, § 1003, tit. 38, § 0308 (1943); Okla. Stat. Ann. tit. 15, §§ 25, 26 (1951); S.D. Comp. Laws §§ 30.0804-5 (1939).

⁶ See particularly Bohlen, "Liability of Infants and Insane Persons," 23 *Mich. L. Rev.* 9 (1924); Hornblower, "Insanity and the Law of Negligence," 5 *Col. L. Rev.* 278 (1905); Ames, "Law and Morals," 22 *Harv. L. Rev.* 97 (1908).

1934, section 283 read: "Unless the actor is a child or an insane person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances." At the very end of the comments to this section the reporters added a caveat: "The Institute expresses no opinion as to whether insane persons are required to conform to the standard of behavior which society demands of sane persons for the protection of the interests of others." This, of course, was a polite method of saying that the reporters hoped that the cases would turn toward non-liability. This method was used by the Institute in other areas. In 1948, however, with very few additional cases having been decided, the *Restatement* reporters admitted defeat. In the 1948 supplement, section 283 was amended to make it clear that insane persons are responsible for their negligent conduct. The bulk of the citations in Professor Eldredge's explanation for the change involve intentional torts. He cites only one new negligence case and that a municipal court decision in New York.⁷ The reporter concludes by reasoning that if these jurisdictions would hold the insane for intentional torts, they "would not hesitate to hold an insane person for causing the same harm unintentionally."⁸

Elsewhere in the *Restatement* there are only two provisions dealing with the subject. In section 289, it is held that *inferior intelligence* (unless the actor is a minor or "possibly unless he is insane") will not excuse a person from the requirement of exercising the intelligence of a reasonable man in the negligence standard. As regards intentional torts, no direct statements are made, but in the section on general capacity it is asserted that the actor may be excused if he does not possess a "particular state of mind" required for the tort. As examples, the reporter cites the fact that no specific intent is required for trespass to land while an intent to imprison is required for false imprisonment. It should be noted, however, that the section ends with a sentence calling attention to the fact that, at the time, the *Restatement* took no position in regard to the negligence responsibility of the insane.

Since nearly all of the American cases have denied a defense of insanity, the courts have been very laconic in expressing what they mean by the term insanity or in describing what specific psychiatric evidence was presented by the defendant. Many of the opinions involve the court's sustaining of a demurrer to a defense of insanity raised in the pleadings.⁹ Others concern defendants who have already

⁷ *Sforza v. Green Bus Lines, Inc.*, 150 Misc. 180, 268 N.Y.S. 446 (1934).

⁸ *Restatement, Torts* § 283 (Supp. 1948).

⁹ *Feld v. Borodofski*, 87 Miss. 727, 40 So. 816 (1906); *Bollinger v. Rader*, 153 N.C. 488, 69 S.E. 497 (1910); *Jewell v. Colby*, 66 N.H. 399, 24 Atl. 902 (1890); *Becker v. Becker*, 207 Misc. 17, 138 N.Y.S.2d 397 (1954).

been adjudged insane by a criminal court¹⁰ or as a result of commitment to a mental hospital.¹¹

Why have the courts been so unanimous in denying the defense of insanity in tort cases? The reasons were very well expressed in the earliest cases and have not been improved upon in later opinions.¹² The theories would seem to be four in number:

(1) Tort law, unlike criminal law, is predicated on compensating for harm done, not inflicting punishment. It looks to the act of the defendant and its resultant harm, not to guilty intent.

(2) As between the insane actor who caused the harm and his innocent victim, the tort law looks with favor on the victim. It will require that the insane person compensate the victim from his available estate rather than allow the loss to fall wholly on the victim.

(3) The imposing of liability on insane persons will encourage custodians and guardians of the insane to prevent their wards from inflicting harm on others.

(4) Were a rule of non-responsibility for the insane to be adopted, it could be used as a fraudulent defense since the absence of mental illness may be difficult to prove.

Prosser has listed another possible reason for the courts' position against non-liability: "an unexpressed fear of introducing into the law of torts the confusion and unsatisfactory tests attending proof of insanity in criminal cases."¹³

It should be noted that the reasons as above listed apply to all types of torts without exception. This circumstance, plus the broad language of the *Restatement*, will present some difficulties in application as we examine the case law in the separate causes of action.

Intentional Torts

As indicated earlier, it seems well settled that insane persons will be held liable for the less sophisticated intentional torts such as

¹⁰ Phillips' Committee v. Ward, 241 Ky. 25, 43 S.W.2d 331 (1931); Shapiro v. Tchernowitz, 3 Misc.2d 617, 155 N.Y.S.2d 1011 (1956); Guardianship of Meyer, 218 Wis. 381, 261 N.W. 211 (1935). See also Parke v. Dennard, 218 Ala. 209, 118 So. 396 (1928).

¹¹ The bulk of all of the cases involving mentally ill defendants are in this category. See, for example Young v. Young, 141 Ky. 76, 132 S.W. 155 (1910); Van Vooren v. Cook, 273 App. Div. 88, 75 N.Y.S.2d 362 (1947); Sforza v. Green Bus Lines, Inc., 150 Misc. 180, 268 N.Y.S. 446 (1934); Sweeney v. Carter, 24 Tenn. App. 6, 137 S.W.2d 892 (1939); Shedrick v. Lathrop, 106 Vt. 311, 172 Atl. 630 (1934).

¹² See particularly McIntyre v. Sholty, 121 Ill. 660, 13 N.E.2d 239 (1887); Morse v. Crawford, 17 Vt. 499 (1845).

¹³ Prosser, Torts 792 (2d ed. 1955).

trespass to land,¹⁴ conversion,¹⁵ and assault and battery.¹⁶ In false imprisonment there is only one decision, an 1848 New York case,¹⁷ which holds liability.

In assault and battery we find a fairly strong line of cases, the largest for any one tort. All but one of the cases are very simply written and in broad lines they merely assert that insane persons are responsible for their torts. Up to 1959, the leading cases were *McGuire v. Almy*¹⁸ and *Van Vooren v. Cook*.¹⁹ Both involved batteries on persons attending severely mentally ill patients. In *McGuire* the plaintiff was a nurse attending a patient confined to a sick room at home, while in *Van Vooren* the plaintiff was a ward attendant in a mental hospital. In 1959, however, a district court of appeals in California had occasion for the first time to apply its code provision in regard to mentally ill tortfeasors. Section 41 of the Civil Code reads, "A minor, or person of unsound mind, of whatever degree, is civilly liable for a wrong done by him, but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful." The court, in *Mullen v. Bruce*,²⁰ had before it an alcoholic patient who, in delirium tremens, assaulted a nurse who was trying to prevent the patient from leaving the sanatorium. In considering the case before him, Justice Griffen referred to the above code provision and a recent California case²¹ which held a four-year-old child for battery. He then cited *McGuire v. Almy*, supra, the Massachusetts case which is very similar in its facts and which holds liability. Justice Griffen then concluded,

¹⁴ *Amick v. O'Hara*, 6 Blackf. 258 (Ind. 1843); *Cross v. Kent*, 32 Md. 581 (1870) ("idiot or insane person"); *Mutual Fire Ins. Co. v. Showalter*, 3 Pa. Super. 452 (1897); *Cathcart v. Matthews*, 105 S.C. 329, 89 S.E. 1021 (1916); *In re Guardianship of Meyer*, 218 Wis. 381, 261 N.W. 211 (1935) (the facts are not clear on whether the defendant's act of setting fire to the plaintiff's property was intentional or negligent; commentators seem to list the case as involving an intentional burning).

¹⁵ *Morse v. Crawford*, 17 Vt. 499 (1845). See also *William v. Careron*, 26 Barb. Ch. 172 (N.Y. 1857).

¹⁶ *Mullen v. Bruce*, 168 Cal. App. 2d 494, 335 P.2d 945 (1959); *Chesapeake & O. Ry. Co. v. Francisco*, 149 Ky. 307, 148 S.W. 46 (1912); *McGuire v. Almy*, 297 Mass. 323, 8 N.E.2d 760 (1937); *Feld v. Borodofski*, 87 Miss. 727, 40 So. 816 (1906); *Gibson v. Pollack*, 179 Mo. App. 188, 166 S.W. 874 (1914); *Van Vooren v. Cook*, 273 App. Div. 88, 75 N.Y.S.2d 362 (1947); *Kusah v. McCorkle*, 100 Wash. 318, 170 Pac. 1023 (1918). See also *Sauer v. Sack*, 34 Ga. App. 748, 131 S.E. 98 (1925) (the defendant claimed to suffer from "epileptic or other like attacks"; court treated defense as that of insanity and denied defense).

¹⁷ *Krom v. Schoonmaker*, 3 Barb. 647 (N.Y. 1848) (mentally ill justice of the peace brought plaintiff before him on invalid criminal complaint).

¹⁸ 297 Mass. 323, 8 N.E.2d 760 (1937).

¹⁹ 273 App. Div. 88, 75 N.Y.S.2d 362 (1947).

²⁰ 168 Cal. App. 2d 494, 335 P.2d 945 (1959).

²¹ *Ellis v. D'Angelo*, 116 Cal. App.2d 310, 253 P.2d 675 (1953).

There seems to be no apparent distinction between such a person [an insane person] and a four-year-old child insofar as it bears on the question here involved. . . . An infant is liable for his torts even though he lacks the mental development and capacity to recognize the wrongfulness of his conduct so long as he has the mental capacity to have the state of mind necessary to the commission of the particular tort with which he is charged.²²

In regard to the case before him, the judge asserted, "Whether the defendant had sufficient capacity to intend the violent conduct essential to the commission of battery was a factual question for the trial judge."²³

In its essential characteristics, the *Mullen* case is in accord with the other decisions in this area. It does hold liability. However, it requires a factual examination of an *intent*, even so general an intent as that to commit "violent conduct." It makes the standard for mentally ill persons the same as that for infants, an interpretation of the Civil Code which is not required by its language. Through such an analogy, some mentally ill persons could be held *not* responsible for battery—or other torts—as long as they did not "intend" their conduct, or, did not have the required "capacity." And yet, the Civil Code says insane persons are responsible for their torts no matter what the "degree" of unsoundness of their minds.

It is understandable that Justice Griffen should fall into applying to the insane the same test as is applied to infants. The first evidence of this inclination is found in a 1924 article by Professor Bohlen entitled *Liability in Tort of Infants and Insane Persons*.²⁴ The law which Bohlen deals with does not treat the two types of defendants in the same manner. He does, however, argue that the courts should treat them the same way and should apply a fault principle to them, thus discharging some of each group from responsibility for their torts. Later, Prosser in his text opens a discussion of insanity with the statement: "Lunatics usually are classed with infants, and are held liable for their torts."²⁵ The case authorities cited by Dean Prosser in this section do not make this classification.

Continuing with the subject of intentional torts, a series of cases²⁶

²² *Mullen v. Bruce*, 168 Cal. App. 2d 494, 335 P.2d 945, 947-948 (1959).

²³ *Mullen v. Bruce*, *supra* note 22, at 497, 335 P.2d at 947.

²⁴ 23 Mich. L. Rev. 9 (1924).

²⁵ Prosser, Torts 791 (2d ed. 1955).

²⁶ *McIntyre v. Sholty*, 121 Ill. 660, 13 N.E.2d 239 (1887); *Roberts v. Hays*, 284 Ill. App. 275, 1 N.E.2d 711 (1936); *Seals v. Snow*, 123 Kan. 88, 254 P. 348 (1927); *Phillips' Committee v. Ward*, 241 Ky. 25, 43 S.W.2d 331 (1931); *Young v. Young*, 141 Ky. 76, 132 S.W. 155 (1910); *Jewell v. Colby*, 66 N.H. 399, 24 Atl. 902 (1890); *Bolinger v. Rader*, 153 N.C. 488, 69 S.E. 497 (1910); *Shapiro v. Tchernowitz*, 3 Misc. 2d 617, 155 N.Y.S.2d 1011 (1956); *Eliot v. Sternberg*, 61 N.Y.S.2d 73 (1946); *Ross v. York*, 233 S.W.2d 347 (Tex. C.A. 1950).

involving wrongful death actions as a result of intentional killings provides our next strongest line of authority from the courts. Without exception, all of these cases hold the insane defendant liable for compensatory damages. A number of the cases concern defendants previously discharged from criminal homicide by reason of their insanity,²⁷ or defendants who were confined to mental hospitals after the killings.²⁸ In *Bollinger v. Rader*²⁹ the defendant had been confined to a mental hospital and was discharged as "safe" by the hospital. Shortly after his release he shot and killed the plaintiff's intestate. In *Young v. Young*,³⁰ two police officers were sent to the home of the defendant to arrest him as insane and, apparently, to deliver him to a mental hospital. When they tried to seize him, the defendant shot and killed one of the officers.

In one of the most interesting cases in the field, *Parke v. Dennard*,³¹ the Alabama court held a mentally ill person (a paranoid personality) for damages under the Alabama wrongful death act which measures recovery only on a *punitive* basis. The defendant had earlier been discharged of criminal liability for the same killing by reason of insanity. In the trial of the civil case, the defendant again pleaded his insanity and presented expert testimony that he was suffering from paranoia. Paranoia is a psychosis, a severe mental disease warranting confinement to a mental hospital. The defendant was so committed after the criminal trial. In that hospital he came under the care of two psychiatrists. These psychiatrists testified for the plaintiff at the civil trial and gave it as their opinion that the defendant was "a paranoid personality, but not a paranoiac, and that while defendant was 'eccentric and cranky' he was not suffering from a mental disease when he entered the state institution."³² They asserted that in their opinion the defendant was not suffering from a mental disease when he committed the homicide. In answer to questions based on the *M'Naghten Rules*, the psychiatrists answered that "such a [paranoid] personality has sufficient will power to refrain from doing wrong if he so desired, and that he had sufficient mentality to know that it was wrong to do the particular act in question."³³ On this evidence, the appellate court refused to upset the verdict of \$20,000 as granted below.

²⁷ Phillips' Committee v. Ward and Shapiro v. Tchernowitz, *supra* note 26. See also *Parke v. Dennard*, 218 Ala. 209, 118 So. 396 (1928).

²⁸ *Young v. Young*; *Jewell v. Colby*; *Bollinger v. Rader*; *Ross v. York*, all cited *supra* note 26.

²⁹ 153 N.C. 488, 69 S.E. 497 (1910).

³⁰ 141 Ky. 76, 132 S.W. 155 (1910).

³¹ 218 Ala. 209, 118 So. 396 (1928).

³² *Parke v. Dennard*, *supra* note 31, at 213, 118 So. at 400.

³³ *Id.* at 214, 118 So. at 400.

The Alabama decision is not out of line with the other decisions discussed in this section. The court clearly admitted that were the defendant found insane (or, in this case, suffering from paranoia), it would be a valid defense to the civil action because such persons are not liable for punitive damages. However, the plaintiff's evidence was enough to sustain a finding that the defendant was not suffering from "a mental disease" and was therefore wholly liable. Today, these same lines are drawn in psychiatry between paranoia and paranoid personalities, but psychiatrists might be less apt to refuse to classify the latter as a mental disease.

Misrepresentation

I have found only three decisions³⁴ under American common law involving insane persons and the tort of misrepresentation. Only two of them are authoritatively presented and they are in conflict. The most recent decision occurred in the Supreme Court of Kings County, New York City, in 1954. In *Becker v. Becker*³⁵ the plaintiff sued her husband for "fraud and deceit" in representing before their marriage that he was not suffering from any serious ailments when actually he was then visiting a psychiatrist in treatment for "a mental illness known as schizophrenia."³⁶ The defendant moved for judgment on the pleadings. Judge Brenner granted the motion and dismissed the complaint, finding that on the basis of the complaint the defendant was incapable of fraud and thus not responsible in tort. For the proposition that an incompetent (which, it seems, Judge Brenner considered the same as insanity) is incapable of deception the court cited two cases, *Chaddock v. Chaddock*³⁷ and *Williams v. Hays*.³⁸ The *Chaddock* case is almost the same as *Becker* on its facts, but the wife was seeking and received an annulment of the marriage, an entirely different issue. The *Williams* case is a negligence action holding that insane persons are responsible for their torts. It contains dicta that such persons may not be responsible for torts in which malice is required such as defamation and malicious prosecution. Misrepresentation is *not mentioned* by the court as an exception to the general rule of liability.

The other case in this area is *Spaulding v. Harvey*,³⁹ an 1891 Indiana decision. Here, two mentally ill persons under guardianship

³⁴ *Ragan v. Cox*, 210 Ark. 152, 194 S.W.2d 681 (1946); *Spaulding v. Harvey*, 129 Ind. 106, 28 N.E. 322 (1891); *Becker v. Becker*, 207 Misc. 17, 138 N.Y.S.2d 397 (1954).

³⁵ *Becker v. Becker*, *supra* note 34.

³⁶ *Id.* at 19, 138 N.Y.S.2d at 399.

³⁷ 130 Misc. 900, 226 N.Y.S. 152 (1928).

³⁸ 143 N.Y. 442, 38 N.E. 449 (1894).

³⁹ 129 Ind. 106, 28 N.E. 322 (1891).

fraudulently induced the plaintiffs to execute a mortgage by telling them that they had been discharged from the guardianship as being mentally competent. The court held the mortgage void, since it was made while the defendants were under guardianship, but asserted: "One may, however, be so weak intellectually as to be incapable of managing his estate, and thus be legally subjected to guardianship, and still be capable of perpetrating a fraud."⁴⁰ This pronouncement about mental capacity was not followed by citations to authority, either legal or psychiatric.

The only other case which can be cited in this field is *Ragan v. Cox*⁴¹ wherein the defendant was charged with fraudulently inducing a 12-year-old girl to marry him. In a rather uncertain manner, it might be said that the defendant submitted some lay testimony that he, a fifty-two-year-old man, was of low intelligence. The Arkansas court interpreted this as an insanity defense and dismissed it, asserting broadly the usual proposition that insane persons are liable for their torts.

On the basis of the above decisions we certainly cannot assert an American common law rule of responsibility of the insane for misrepresentation. The cases are too few, they are in conflict, and they do not present any well-developed theory of liability or non-liability.

Any proper analysis of the responsibility of the mentally ill in this area would require an examination of the still-developing bases of liability for the tort as a whole. Misrepresentation first arose as the intentional tort of deceit.⁴² It required "scienter," or, an intent to deceive. Looked at more deeply, scienter means a lack of belief in the truth of the representation made. At present, however, many states impose liability for *negligent* misrepresentation, and some hold strict liability without fault for certain types of false statements.⁴³ An application of responsibility to mentally ill persons would depend, therefore, on which basis of liability was applied. Only on a firm application of the requirements of intentional deceit would there seem any opportunity for avoidance of responsibility.

Defamation

The alleged insanity of the defendant has been used in defamation cases in two ways to the advantage of the defendant. The first is to apply it in mitigation of damages by showing that since the com-

⁴⁰ Spaulding v. Harvey, *supra*, note 39, at 108, 28 N.E. at 324.

⁴¹ 210 Ark. 152, 194 S.W.2d 681 (1946).

⁴² Pasley v. Freeman, 3 Term. Rep. 51 (1789); 1 Street, Foundations of Legal Liability 375 (1906).

⁴³ Prosser, Torts 541-549 (2d ed. 1955).

munity was aware of the defendant's mental illness and therefore did not believe him, the defendant's reputation was not injured. This method has been successful in at least four cases of slander.⁴⁴

The second area where a defendant may use a defense of insanity is, of course, in regard to liability itself. There is dicta in some of the earliest cases,⁴⁵ some recent cases,⁴⁶ and in many of the text books⁴⁷ that an insane person is not liable for defamation because of the requirement of "malice" in the tort. Dictum in an 1898 lower court decision⁴⁸ in New York dismissed this theory as applicable only in cases where a qualified privilege is available to the defendant. However, it can be asserted that two cases, the only reasonably clear opinions in this field, do hold the existence of insane delusions a defense to a slander action. The Kentucky court in 1904 discharged an insane person after quoting from Cooley and others, but in its specific holding asserted

. . . in order to defeat a recovery in a case like the one at bar upon the ground of insanity, it should satisfactorily appear from the evidence that at the time of speaking the defamatory words the person uttering them was either totally deranged, or laboring under an insane delusion on the subject to which the words related.⁴⁹

Under a similar rule, a Virginia court in 1817 granted an injunction to prevent a slander action where the defendant was insane "on the subject to which the defamatory words were related," though it also said, ". . . his mind was sound in other respects."⁵⁰ The judges who wrote these two decisions could have known little of "modern psychiatry," but they laid down remarkably sound theories of mental illness.

Alienation of Affections

The action of alienation of affections is often said to require a specific intent or malice. A Tennessee court would seem to have

⁴⁴ *Wilson v. Walt*, 138 Kan. 205, 25 P.2d 343 (1933) (local notoriety of insanity of defamer can mitigate damages to such a degree as to eliminate cause of action); *Irvine v. Gibson*, 117 Ky. 306, 77 S.W. 1106 (1904); *Dickinson v. Barber*, 9 Mass. 225 (1812); *Bryant v. Jackson*, 6 Humph. 199 (Tenn. 1845). See also *Yeates v. Reed*, 4 Blackf. 463 (Ind. 1838) (insanity of defendant can be received in excuse or mitigation of damages according to circumstances of the case).

⁴⁵ *McIntyre v. Sholty*, 121 Ill. 660, 13 N.E. 239 (1887); *Feld v. Borodofski*, 87 Miss. 727, 40 So. 816 (1906); *Williams v. Hays*, 143 N.Y. 442, 38 N.E. 449 (1894).

⁴⁶ *Eliot v. Sternberg*, 61 N.Y.S.2d 73 (1946); *In re Guardianship of Myers*, 218 Wis. 381, 261 N.W. 211 (1935).

⁴⁷ Cooley, Torts 192-193 (Haggard, ed. 1932); Prosser, Torts 792-793 (2d ed. 1955).

⁴⁸ *Ulrich v. New York Press Co.*, 23 Misc. 168, 50 N.Y.S. 788 (1898) (case does not involve an insanity defense).

⁴⁹ *Irvine v. Gibson*, 117 Ky. 306, 320, 77 S.W. 1106, 1108 (1904).

⁵⁰ *Horner v. Marshall's Adm'x*, 5 Munf. 466, 477 (Va. 1817).

required a showing that a person of unsound mind be capable of having malice or improper motives toward the defendant in order to be held liable for the tort.⁵¹ In the only other case in this area, the Vermont supreme court in 1934 denied a defense of insanity to an action of alienation of affections with the familiar statement that insane persons are responsible for their torts.⁵² The authority for their finding is an 1845 Vermont decision holding an insane person for conversion.⁵³

Negligence

There are presently only two reported American cases⁵⁴ involving the responsibility in negligence of insane persons. Both are from the same jurisdiction. They hold liability with the blanket rationale that insane persons are responsible for their torts. No distinction is drawn between the rule of liability for negligence and that for any other tort.

We have seen earlier that the *Restatement*⁵⁵ has always taken the position that mentally deficient persons will be held to the objective standard of reasonableness in negligence law. Since the 1948 amendments it also takes the position that insane persons are responsible for their torts.⁵⁶ It was the *Sforza* case,⁵⁷ a lower court decision in New York City, which was cited by Professor Eldredge as the only new case in point holding liability at the time of the amendment. It is noteworthy that the *Sforza* case should have occasioned the change in the *Restatement*. In that case it is alleged that a bus driver for the defendant company "suddenly became insane and apparently lost control of the bus"⁵⁸ which struck a parked vehicle and injured the plaintiff. The driver was immediately committed to a mental hospital and was still a patient at the time of the trial. The insanity of the driver was alleged as a defense to the negligence action.

⁵¹ *Sweeney v. Carter*, 24 Tenn. App. 6, 137 S.W.2d 892 (1939).

⁵² *Shedrick v. Lathrop*, 106 Vt. 311, 172 Atl. 630 (1934).

⁵³ *Morse v. Crawford*, 17 Vt. 499 (1845).

⁵⁴ *Williams v. Hays*, 143 N.Y. 442, 38 N.E. 449 (1894), 157 N.Y. 541, 52 N.E. 539 (1899); *Sforza v. Green Bus Lines, Inc.*, 150 Misc. 180, 268 N.Y.S. 446 (1934). *Williams v. Hays* involves a sea captain whose ship ran aground. The captain had been on the bridge continuously for some days and was in a state of exhaustion and/or mental disorder when the ship was in distress. The court dismissed mental illness as a defense in a negligence action. The reasoning in the case is unclear and uncertain. As Wilkinson said, "The reported opinions involving this controversy indicate that *Williams v. Hays* is filled with the drama of the sea, but is not very enlightening as to the law of the land." *Op. cit. supra*, Note 2, at 43.

⁵⁵ *Restatement, Torts* § 289 (1934), p. 2 *supra*.

⁵⁶ *Id.* § 283 (Supp. 1948), p. 1 *supra*.

⁵⁷ *Sforza v. Green Bus Lines, Inc.*, 150 Misc. 180, 268 N.Y.S. 446 (1934).

⁵⁸ *Id.* at 180, 268 N.Y.S. at 446.

Judge Pette indicates that "defendants suggest that the insanity may have been produced by a state of mind on the part of [the driver] induced by his wife's expectant motherhood that morning."⁵⁹ It would seem that at trial evidence was submitted of "unusual and irrational acts of the driver at the time of and immediately following the accident."⁶⁰

Judge Pette dismissed the defense of insanity as not available in an action of negligence. He cited *Williams v. Hays*⁶¹ as authority for this position in New York law and he refused to recognize any distinction between non-feasance and misfeasance for the purposes of this defense. He indicated his agreement with the policy reasons for holding insane persons for their torts as expressed in *McIntyre v. Sholty*.⁶²

The difficulty presented by the *Sforza* case is not in its result. It is similar to nearly all of the other cases reviewed in this article in its treatment of the legal and psychiatric issues involved in the case, i.e., it gives us only a very sketchy picture of what was actually wrong with the bus driver, and it dismisses the defense of insanity just about as summarily as other opinions. However, unlike most of the other cases, it involves *sudden* mental illness resulting in a general loss of control by the defendant. Up to the moment of the accident the defendant was apparently acting normally and was functioning quite well in society—driving a bus. Had the driver had any other kind of illness without warning at the wheel, he would *not* have been liable for the injuries caused. It would then have been classed as an unavoidable accident. For example, had he sustained a heart attack,⁶³ cerebral hemorrhage,⁶⁴ an epileptic seizure,⁶⁵ gone blind,⁶⁶ or suddenly fallen asleep,⁶⁷ or otherwise fainted or become unconscious,⁶⁸ he would have been excused. What are the distinctions between these cases and sudden mental illness? The policy reasons for holding in-

⁵⁹ *Id.* at 181, 268 N.Y.S. at 447.

⁶⁰ *Id.* at 181, 268 N.Y.S. at 447.

⁶¹ *Supra* note 54.

⁶² 121 Ill. 660, 13 N.E.2d 239 (1887).

⁶³ *Weldon Tool Co. v. Kelley*, 81 Ohio App. 427, 76 N.E.2d 629 (1947).

⁶⁴ *Keller v. Wonn*, 140 W. Va. 860, 87 S.E.2d 453 (1955).

⁶⁵ *Moore v. Capital Transit Co.*, 226 F.2d 57 (D.C. Cir. 1955); *Wishone v. Yellow Cab Co.*, 20 Tenn. App. 229, 97 S.W.2d 452 (1936).

⁶⁶ *Livandais v. Block*, 13 La. App. 345, 127 So. 129 (1930) (dictum).

⁶⁷ *Bushnell v. Bushnell*, 103 Conn. 583, 131 Atl. 432 (1925); *Kaplan v. Kaplan*, 213 Iowa 646, 239 N.W. 682 (1931); *Steele v. Lackey*, 107 Vt. 192, 177 Atl. 309 (1935).

⁶⁸ *Cohen v. Petty*, 65 F.2d 820 (D.C. Cir. 1933); *Ford v. Carew & English*, 89 Cal. App. 2d 199, 200 P.2d 828 (1948); *Armstrong v. Cook*, 250 Mich. 180, 229 N.W. 433 (1930); *Harrington v. H. D. Lee Mercantile Co.*, 97 Mont. 40, 33 P.2d 553 (1934); *Slattery v. Haley*, Ont. L.R. 52, 95, 3 D.L.R. 156 (1923).

sane persons for their torts are not as weighty in a sudden illness case as in a situation where a confirmed mental patient commits a tort.

It must be admitted, however, that proof problems are more difficult in sudden mental illness cases than where the defendant alleges and offers proof of a more continuous mental disturbance.

By deciding the case as it did, the New York court does provide us with authority for the position that no matter how sudden the onset of the mental disease, it is no defense to a tort action. It is unfortunate that neither in its facts nor in its reasoning does the case give us any help in defining what the law means by *insanity* in the law of torts.

Contributory Negligence

We might also examine here the existing cases on the legal standard for the contributory negligence of mentally ill or mentally deficient plaintiffs. In their recent text, Harper and James assert; "Probably a subjective standard will be applied in determining the contributory negligence of insane plaintiffs."⁶⁹ As authority for this proposition the authors cite five cases. Four involve "plaintiffs of low intelligence"⁷⁰ while the other involves an 88-year-old man whose "mental powers have been blunted with age."⁷¹ Three of the cases⁷² on mental deficiency require that the plaintiff be virtually "devoid of intelligence" to the extent he be unable to apprehend danger before the objective standard is relaxed. The remaining case, which allows a subjective test generally where the plaintiff is below normal intelligence, is a federal common law decision of 1911.⁷³ The authors do not cite any contrary decisions.

I have been able to find two contrary cases imposing the objective standard for contributory negligence. One involves mental illness (manic-depressive psychosis),⁷⁴ and the other involves mental deficiency.⁷⁵ The manic-depressive plaintiff was driving an automobile. The Washington court held that all drivers must exercise reasonable

⁶⁹ 2 Harper & James, Torts § 16.8 (1956).

⁷⁰ Seattle Elec. Co. v. Hovden, 190 Fed. 7 (9th Cir. 1911), *affirming* Hovden v. Seattle Elec. Co., 180 Fed. 487 (C.C.W.D. Wash. 1910); Worthington v. Mencer, 96 Ala. 310, 11 So. 72 (1892); Riesbeck Drug Co. v. Wray, 3 Ind. App. 467, 39 N.E.2d 776 (1942); Zajackowski v. State, 189 Misc. 299, 71 N.Y.S.2d 261 (1947).

⁷¹ Johnson v. St. Paul City Ry. & Co., 67 Minn. 260, 69 N.W. 900 (1887).

⁷² Riesbeck Drug Co. v. Wray and Worthington v. Mencer, *supra* note 70, specifically so state, and Zajackowski v. State, *supra* note 70, a case involving a six-year-old Mongoloid whose mental age was 2½, holds so in effect, apparently applying the subjective standard of infant actors.

⁷³ Seattle Elec. Co. v. Hovden, *supra* note 70.

⁷⁴ Criez v. Sunset Motor Co., 123 Wash. 604, 213 Pac. 7 (1923).

⁷⁵ Deisenreiter v. Kraus-Merkel Malting Co., 97 Wis. 279, 72 N.W. 735 (1897).

care in operation of vehicles for the safety of all highway users. The court carefully limits its holding to automobile operators.

The *Restatement*⁷⁶ "expresses no opinion" on whether or not an insane person will be tested objectively or subjectively on contributory negligence.

A COMMENTARY ON THE LAW

In the preceding sections of this paper the existing case law on the tort liability of persons with mental disease has been examined. There are, I believe, some striking features to it which might be summarized here:

(1) The courts are treating nearly all torts alike in denying a defense of mental disease.

(2) The reasons for holding liability are policy matters having little to do with theory of the different torts or an analysis of mental diseases.

(3) There has been almost no attempt to define what is meant by "insanity" in tort cases.

(4) There are surprisingly few cases in American law in which an insanity defense has been raised.

The characteristics indicated above are to a great extent interlocked as a rationale in the individual decisions we have examined. The fact that the reasons for holding liability apply equally to all torts leads the courts to ignore distinctions in the required elements of the torts. Since they deny the defense rather summarily, they do not feel the need to analyze or define "insanity." Yet, it seems to me that if the *number* of cases increase, our modern courts under the pressure of better-presented and better-argued defenses may be forced to entertain at least an examination of the distinctions drawn above.

In the criminal law, a consistent theory of responsibility can be maintained. The theories of responsibility in torts, however, are too divergent to allow such a practice to be easily maintained. To illustrate this point, it seems to me that on the case law previously examined the most significant developments have been in defamation and negligence. In defamation, two important cases⁷⁷ have allowed a defense of insanity where the defamatory remarks were the result of deluded thinking. This same theory could be applied to other torts such as malicious prosecution and abuse of civil process where the defendants act under paranoid delusions.

In the negligence cases, we see an application of the current

⁷⁶ Restatement, Torts § 464, *caveat* (1934).

⁷⁷ *Irvine v. Gibson*, *supra* note 49; *Horner v. Marshall's Adm'x*, *supra* note 50.

trend to treat all torts alike in regard to the defense of mental disease. Professor Eldredge in the *Restatement*, as indicated earlier, thought that the courts which had held liability for intentional torts "would not hesitate"⁷⁸ to hold liability for negligence. This seems to be on the theory that negligence is a lesser tort and liability is more easily established. On the contrary, it seems to me a clear extension of the theory of responsibility. To hold an insane person, i.e., mentally ill or mentally deficient, for an intentional tort, a court can examine the rudiments of his conduct, uncontrolled though it may be. To impose liability for negligence, however, the court must blindly apply the objective reasonable man standard. To apply the latter is in effect strict liability upon the mentally ill and mentally deficient imposed without examination of the circumstances of the act. If this be the case, I wonder why the courts bother to use common law cause of action labels such as "battery," "conversion," or "defamation" where the defendant is mentally ill or mentally deficient? Only where there is no liability for the same act if done negligently would there be any need to examine the essential requirements of intentional torts.

The last two characteristics listed above concerning the existing case law may not seem related. I wonder, however, if the absence of definitions of "insanity" for the purpose of tort liability is not influenced by the small number of cases decided and on the selective nature of those cases. A large proportion of this otherwise small number of decided cases have concerned defendants already adjudged insane or defendants who were committed to mental hospitals at the time of the act or at the time of the trial. The fact of this prior determination of mental disease made it largely unnecessary, it was thought, for the tort court to go into the question. Also, on the reverse side of the coin, these cases are an indication of the great hesitancy of defendants and defense attorneys to raise the defense of insanity in tort litigation unless the fact of the defendant's mental illness is thrust upon them, or upon the court, by other circumstances. This hesitancy by the defense to use the excuse of insanity may be due not only to the opinion that such a defense is futile, but to the fact that (a) mental illness often goes undetected in such situations, (b) if it does exist, it may be difficult to prove, and (c) the use of such a defense, even if successful, may hold relatively worse social consequences for the defendant than paying a tort verdict.

If the above considerations have any merit, then they are a manifestation of a continued lack of understanding and even continued fear of mental illness in our society. A proper examination of the problems of tort liability for the mentally ill and mentally deficient

⁷⁸ Restatement, Torts § 283, p. 655 (Supp. 1948).

may therefore be influenced as much by an analysis of the psychiatric classifications of mental illness in relation to tortious conduct as by any further arguments about the theories of liability. In the remainder of this paper, I would like to offer such an analysis.

Mental Deficiency

We might start our examination with the basic distinction between mental illness and mental deficiency. Some of the case law⁷⁹ has lumped the two under "insanity." By mental deficiency we mean an abnormally low level of *intelligence* according to the age of the individual. It is caused by an arrested or imperfect development in the brain itself usually congenital in origin, but sometimes the result of disease or trauma. The degree of mental deficiency can be measured fairly accurately by intelligence quotient tests and is roughly graded severe, moderate, or mild.⁸⁰ Severely or moderately deficient persons are apt to be institutionalized or otherwise only remotely in contact with community life.⁸¹ Many of the mildly deficient or persons of borderline intelligence may, however, be able to function in everyday life if heavy demands and responsibilities are not placed on them. Functioning in such a way, their low intelligence is often unrecognized. Such persons are amenable to basic social controls and moral standards. They can control their conduct. The law usually deals with them as normal persons and this seems a quite sensible approach.

It would seem likely that any defense of mental deficiency in a tort action would be limited to the lower levels of the categories of deficiency. Even in these situations, however, I would guess that the judges would be reluctant to draw lines of liability and non-liability based on rigid I.Q. levels.⁸² They would fall back on traditional concepts such as "capacity" and "intent" and would ask the expert witnesses to testify in these terms. For mental deficiency, at least, the result would be a test somewhat similar to that used for minors. An

⁷⁹ See, e.g., *Ragan v. Cox*, 210 Ark. 152, 194 S.W.2d 681 (1946); *Cross v. Kent*, 32 Md. 581 (1870). See also *Sauers v. Sack*, 34 Ga. App. 748, 131 S.W. 98 (1925), which treats epilepsy as insanity. *Seals v. Snow*, 123 Kan. 88, 254 P. 348 (1927), probably also involved an epileptic defendant.

⁸⁰ Intelligence quotients below 50 are graded severe; moderate from 50-70; mild from 70-85. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 23 (1952); Ewalt, Strecker & Ebaugh, *Practical Clinical Psychiatry* 153 (8th ed. 1957).

⁸¹ See cases cited in note 71, *supra*.

⁸² Psychiatrists would seem to agree that the categories of mental deficiency should not be firmly drawn. For individual patients close to the lines in each category "the groupings will vary with the immediate condition of the patient, as well as the skill and training of the examiner." *Diagnostic and Statistical Manual*, *op. cit. supra* note 80 at 10.

argument along these lines has more chance of success and, I believe, greater psychiatric validity, than the older plea to extend the subjective test for minors to all "insane persons."

Mental Illness

The term mental illness or mental disorder is used in psychiatry to identify a large number of diseases which affect the mental processes and behavior of the individual. The diseases can be classified according to severity with the most serious being called "psychoses." Much less severe and disabling are the neuroses and personality disorders.

Psychoses

The severe mental diseases known as psychoses correspond roughly to what a layman calls insanity. The bulk of the population of our mental hospitals suffer from these diseases.

Psychoses may be organic or non-organic. The organic psychoses are associated with or caused by malfunction in the brain itself.⁸³ Short-term organic psychoses may be caused by a toxic reaction from drugs, poisons, or alcohol. Permanent brain damage causing organic psychoses may be due to congenital factors, disease, or trauma. Persons with organic psychoses suffer, in varying degrees, from impairment of all intellectual functions, memory, orientation, judgment, and emotional control. They may have delusions (gross false beliefs) or hallucinations (gross false sensory perceptions).⁸⁴

Is a breakdown into organic and non-organic psychoses (or insanity) of significance to tort law? It will be recalled that the law has traditionally drawn distinctions between *physical* and *mental* conditions. We have seen that sudden physical impairment is a defense to an action in tort. A physical impairment can be very close to a "mental condition," as in the case of epilepsy, and yet is still a defense. It seems doubtful that the law will make a distinction between organic and non-organic psychoses as long as psychiatry itself lists the two as mental diseases. Epilepsy, for example, is not included in this group but is classed as a neurological disease, thus indicating that medicine and law are in agreement in this classification.

⁸³ Ewalt, Strecker & Ebaugh, *op. cit. supra* note 80 at 101 et seq.; White, *The Abnormal Personality* 452 et seq. (2d ed. 1956).

⁸⁴ Noyes, *Modern Clinical Psychiatry* 110 (4th ed. 1953). In this connection, see *Buckley & T.T.C. v. Smith Transport*, 4 D.L.R. 721 (1946), where a truck driver suddenly believed that his truck was being operated under remote electrical control from company headquarters. The Ontario court, in deciding that the driver's employer was not liable to the plaintiff, held that such a delusion would constitute a defense if it prevented the driver either from appreciating his duty of care or from discharging it.

If any breakthrough does occur in this area, I would expect it to be in the acute organic psychotic reactions caused by toxic factors such as drugs, poisons, and gases. Here, if the exposure to the toxic factor is due to no fault of the person and where he commits a tort during a short-duration psychotic episode, I would expect the courts might classify the reaction as physical, particularly if the defense attorneys and expert witnesses stress the actual brain impairment. Such cases could be compared with the dictum one often sees about "involuntary" alcoholic intoxication being a defense to legal action. Non-fault exposure to toxic factors such as opiate and sedative drugs, metallic poisons, and gases are more in the realm of possibility than the much discussed but seldom observed involuntary alcoholic state.

Interesting as the organic psychoses may be, the non-organic, or so-called *functional psychoses*, are much more common.⁸⁵ In this area are those mental diseases without observable brain malfunction where the person has varying degrees of personality disintegration and failure to relate himself to external reality and other people. The two largest categories of functional psychoses are the manic-depressive psychoses and the schizophrenic psychoses.

Manic-depressives are disordered primarily in their mood, or affective behavior. They may swing between great overactivity (manic reaction) and inhibition or retardation (depressive reaction) in their speech, ideas, actions, or emotions; or they may stay fixed in one or the other mood. In some patients, delusions or hallucinations may also occur.

The incidence of these so-called affective or mood disorders in our population is not accurately known.⁸⁶ Mild cases often go undetected or are treated by general medical practitioners. The majority of all cases from mild to severe, who seek psychiatric aid, particularly with the advent of drug therapy, are treated on an out-patient basis.

Depressed patients in this category are more of a danger to themselves than to others. They often have suicidal tendencies. In women patients (and women constitute the majority of patients in the affective disorders), caution must be taken to protect small children from harm at the hands of the mother.

Manic patients present more problems for the law than the depressed. The manic is in closer contact with reality. He is less aware of his illness. His disorder of overactivity is more apt to get him into trouble than the underactivity of the depressed. In acute mania,

⁸⁵ Ewalt, Strecker & Ebaugh, *op. cit. supra* note 80, at 72 *et seq.*; White, *op. cit.* note 83, at 513 *et seq.*

⁸⁶ *Id.* at 178-179.

the patient is often combative and destructive. As is said in a leading psychiatry textbook, "they often indulge in alcoholic and sexual abuses, unwise investments, and large purchases of useless objects or of junk."⁸⁷ Legal difficulties can obviously arise out of such propensities.

Measured by existing law, the manic psychotic person would be responsible for his torts. His intelligence is not impaired; in fact, in a manic episode he may seem to perform brilliant intellectual feats—and with surprising speed and enthusiasm. He is in contact with reality and unless he has accompanying hallucinations or delusions, any "capacity test" imposed by law would find him capable of committing all varieties of torts. The only standard of law which might excuse the manic would be a "control test" or an "irresistible impulse test." For example, a manic is prone to drive an automobile at reckless speed without any real ability to control himself in this respect. In the area of commercial dealings, the eager, fast-talking manic is apt to be seen both as the perpetrator of a fraud and as its victim. His odd commercial activities are certainly the "product" of his mental illness if we would borrow another legal standard used in criminal law⁸⁸ and in will cases.⁸⁹

The largest number of functional psychotics are the schizophrenics, however. This is the commonest form of psychosis in America today with some 30,000 new cases every year.⁹⁰ Unless treated early, many of its victims become chronic institutional cases. Schizophrenia (formerly called dementia praecox) comprises a group of symptoms including inappropriate emotional responses, defective thought processes, delusions, and hallucinations. The disease is subgrouped in a rather diverse way to identify the particular patient's symptom complex. The major classifications are the hebephrenic type, paranoid type, catatonic type, and simple type. The hebephrenic schizophrenics exhibit shallow, inappropriate emotional responses such as giggling or silly mannerisms. They often have rather wild delusions and hallucinations.⁹¹ These are the patients who hear voices, see things, or imagine they are Christ, Hitler, or the first man on the moon. The paranoid schizophrenics are somewhat like the hebephrenics in that they also suffer from delusions and hallucina-

⁸⁷ *Id.* at 187.

⁸⁸ See the use of a "product test" in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

⁸⁹ See, for example, *Boardman v. Woodman*, 47 N.H. 120 (1866) (Doe, J., dissenting opinion); *In re Strittmater's Estate*, 140 N.J. Eq. 94, 53 A.2d 205 (1947); see also Green, "Judicial Tests of Mental Incompetency," 6 Mo. L. Rev. 141 (1941).

⁹⁰ Ewalt, Strecker & Ebaugh, *op. cit. supra* note 80 at 195.

⁹¹ Noyes, *op. cit. supra* note 84 at 381.

tions, but the delusions or hallucinations are more organized and form a pattern of persecution, or, less frequently, grandeur.⁹²

The catatonic schizophrenic has exaggerated periods of overactivity or stupor. The onset of the disease can be rather sudden with overactivity, combativeness, and destructiveness similar to the manic reaction type discussed earlier. These patients generally lapse into stupor, however.⁹³ Some have delusions and hallucinations.

The last schizophrenic type, the simple, is the smallest of the categories in total patients, but has one of the poorest prognoses. These patients may maintain fairly good contact with reality and have few delusions and hallucinations. They rather slowly withdraw from active life and show little ambition or emotion.⁹⁴

There is another and much rarer form of psychosis known as "paranoia."⁹⁵ It is very close to paranoid schizophrenia but with less general deterioration of the personality. There are no hallucinations. There is a very well organized system of delusions of persecution or grandeur.

To the layman, the schizophrenics are the people who are most clearly insane or "crazy." In court, these people, particularly those who have deteriorated most in general personality and are most out of contact with reality, are apt to be excused from responsibility in criminal law, contracts, or wills.

On the tort side, schizophrenics have generally been held for their actions as have other mentally ill persons. Here, however we are faced for the first time with a large group of persons who act in response to delusions and hallucinations. Paranoid types suffering from persecutory delusions may attack their supposed enemies with bodily force, false accusations, or false legal claims. As is said in Ewalt, Strecker, and Ebaugh, "These patients, above all others, are apt to convince a court or an attorney that they have a legitimate case. Every psychiatrist of experience has had some contact with these patients in some form of litigation."⁹⁶ With this statement I am in full agreement. I am surprised, however, at the small number of appellate court cases which have dealt with the subject. We have seen, nevertheless, that two quite old decisions, one in 1817⁹⁷ and

⁹² White, *op. cit. supra* note 83 at 546; Diagnostic and Statistical Manual *op. cit. supra* note 80, at 26-27.

⁹³ Noyes, *op. cit. supra* note 84 at 383; Diagnostic and Statistical Manual, *op. cit. supra* note 80 at 26.

⁹⁴ White, *op. cit. supra* note 83 at 545.

⁹⁵ Diagnostic and Statistical Manual, *op. cit. supra* note 80 at 28. For a case involving paranoia, see Parke v. Dennard, *supra*, note 31.

⁹⁶ *Op. cit. supra* note 80 at 214.

⁹⁷ Horner v. Marshall's Adm'x, *supra* note 50.

the other in 1904,⁹⁸ allowed the existence of a delusion in the defendant to provide a defense to a defamation action. The 1904 Kentucky case specifically referred to "an insane delusion on the subject to which the words related."⁹⁹ The 1817 Virginia court spoke of the defendant's insanity in regard to the subject to which the defamatory words related and mentioned that the defendant's mind was "sound in other respects."¹⁰⁰ The latter is a very creditable definition of paranoia.

It would seem, as indicated earlier, that if modern courts accept the above standard for non-liability for defamation caused by psychotic delusions, the same rule would apply to related torts such as malicious prosecution, false arrest, and unjustified civil litigation. Could the judges not also, on the same theory, apply this rule to violent attacks such as assault and battery similarly related to a defendant's insane delusions or hallucinations? Any distinction between these torts based on special intent or a requirement of malice has largely disappeared from the law at present.

Neuroses and Personality Disorders

It would be rather futile to advance definitions of the large number of milder mental disorders grouped presently under the neuroses (or psychoneuroses) and personality disorders. The neuroses are less significant for liability questions in tort law than the personality disorders. However, some neurotic reactions can be involved in tort actions. A person who "freezes" at the wheel of an automobile, who suffers some other sudden "physical ailment" or "pain" without physical explanation, may be suffering from a type of neurotic reaction.¹⁰¹

⁹⁸ *Irvine v. Gibson*, *supra* note 49.

⁹⁹ *Ibid.*

¹⁰⁰ *Horner v. Marshall's Adm'x*, *supra* note 50.

¹⁰¹ Ewalt, Strecker, Ebaugh, *op. cit. supra*, note 80 at 257, *et seq.* See also the Diagnostic and Statistical Manual, *op. cit. supra*, note 80 at 31-34. It is stated in the Manual that the "chief characteristic of [psychoneurotic] disorders is 'anxiety' which may be directly felt and expressed or which may be unconsciously and automatically controlled by the utilization of various psychological defense mechanisms (depression, conversion, displacement, etc.). In contrast to those with psychoses, patients with psychoneurotic disorders do not exhibit gross distortion or falsification of external reality (delusions, hallucinations, illusions) and they do not present gross disorganization of the personality. Longitudinal (lifelong) studies of individuals with such disorders usually present evidence of periodic or constant maladjustment of varying degree from early life. Special stress may bring about acute symptomatic expression of such disorders.

'Anxiety' in psychoneurotic disorders is a danger signal felt and perceived by the conscious portion of the personality. It is produced by a threat from within the personality (e.g., by supercharged repressed emotions, including such aggressive im-

The personality disorders, however, seem to me to bristle with implications for liability in tort. These "disorders" are evidenced in behavior and show very little indication of subjective anxiety in the patient (characteristic of neurosis) or withdrawal from reality (characteristic of psychosis). Persons with personality disorders are apt to exhibit some symptoms characteristic of more serious mental disease. Some show paranoid tendencies, aggressive personalities, compulsive behavior, alternating moods of elation and sadness, or schizoid personalities.

A special class of personality disorders is presently identified with antisocial, mainly criminal, conduct. Formerly called "psychopathic personality disorders," they are now classified as "sociopathic personality disturbances."¹⁰² In this group are those people who,

pulses as hostility and resentment), with or without stimulation from such external situations as loss of love, loss of prestige, or threat of injury. The various ways in which the patient attempts to handle this anxiety results in the various types of reactions listed below."

These reaction categories are: "anxiety reaction"; "dissociative reaction" (aimless running or freezing); "conversion reaction" (anxiety converted into functional symptoms in organs or parts of the body); "phobic reaction" (neurotic fears of height, animals, etc.); "obsessive compulsive reaction" (unwanted, repetitive thoughts or actions); and "depressive reaction."

¹⁰² This classification is found in the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, *op. cit. supra* note 80 at 38-39. We quote the definition in full:

Sociopathic Personality Disturbance

Individuals to be placed in this category are ill primarily in terms of society and of conformity with the prevailing cultural milieu, and not only in terms of personal discomfort and relations with other individuals. However, sociopathic reactions are very often symptomatic of severe underlying personality disorder, neurosis, or psychosis, or occur as a result of organic brain injury or disease. Before a definitive diagnosis in this group is employed, strict attention must be paid to the possibility of the presence of a more primary personality disturbance; such underlying disturbance will be diagnosed when recognized. Reactions will be differentiated as defined below.

Antisocial reaction

This term refers to chronically antisocial individuals who are always in trouble, profiting neither from experience nor punishment, and maintaining no real loyalties to any person, group, or code. They are frequently callous and hedonistic, showing marked emotional immaturity, with lack of a sense of responsibility, lack of judgment, and an ability to rationalize their behavior so that it appears warranted, reasonable, and justified.

The term includes cases previously classified as "constitutional psychopathic state" and "psychopathic personality." As defined here the term is more limited, as well as more specific in its application.

Dyssocial reaction

This term applies to individuals who manifest disregard for the usual social codes, and often come in conflict with them, as the result of having lived all their lives in an abnormal moral environment. They may be capable of strong loyalties. These individuals typically do not show significant personality deviations other than those im-

according to the latest *Diagnostic and Statistical Manual of Mental Disorders*, "... are always in trouble, profiting neither from experience nor punishment."¹⁰³

Much the same problems with the law may occur with these so-called personality disorders as outlined earlier in regard to the more severe mental illnesses except that the proof problems will be greater. For example, how should the law deal with "the paranoid personality" as distinguished from the more severely ill paranoid schizophrenic? Should one type of person have a defense to a tort action and not the other? I would guess that most of the people who commit slander or libel in this world are at least "paranoid personalities" if not worse. Frankly, I think many *successful* people are "disturbed" in their personalities according to these definitions and are "successful" precisely because of their disordered personalities. Certainly there are paranoid tendencies in the newspaper columnists and legislators who are forever seeing "conspiracies" of evil import all about them. For example (I won't cite any actual legislators, alive or recently dead), Senator Fred Van Ackerman in Allan Drury's book, *Advice and Consent*, is certainly at least a paranoid personality. The Senator is able to do quite a bit of damage to reputations and to his country from his privileged position. In a tort action against the Senator, would we allow evidence of his disordered personality, not severely deluded or hallucinated, to provide a defense to such action?

Lastly, I would like to cite recent studies in this country¹⁰⁴ and Canada¹⁰⁵ indicating that maladjusted personalities do tend to become "accident repeaters." These studies seem to say, in automobile driving for example, that people "drive as they live," i.e., if they are in trouble with the criminal courts; are known to social agencies, public health, and V.D. clinics as constantly needing help; and are known

plied by adherence to the values or code of their own predatory, criminal, or other social group. The term includes such diagnoses as "pseudosocial personality" and "psychopathic personality with asocial and amoral trends."

Sexual deviation

This diagnosis is reserved for deviant sexuality which is not symptomatic of more extensive syndromes, such as schizophrenic and obsessional reactions. The term includes most of the cases formerly classed as "psychopathic personality with pathologic sexuality." The diagnosis will specify the type of the pathologic behavior, such as homosexuality, transvestism, pedophilia, fetishism and sexual sadism (including rape, sexual assault, mutilation).

¹⁰³ *Ibid.*

¹⁰⁴ McFarland & Moseley, *Human Factors in Highway Transport Safety* (1954).

¹⁰⁵ Tillmann & Hobbs, "Accident-Prone Automobile Driver; Study of Psychiatric and Social Background," 106 Am. J. Psy. 321 (1949).

to the credit agencies, they get into more "accidents" than the general population.

When I catalogue these findings on personality disorders, I find myself pulled in various directions. They blur the neater distinctions in the severe mental disorders. They make much more difficult the use of general standards for tort liability such as "capacity" and "intent," and even "delusion" or "hallucination"; and certainly any test of "product of mental disease or defect" is made very difficult to accept when such terms can be applied so universally to the conduct of large parts of our population. The basic assumptions of our legal system about free actions and individual fault are challenged by these psychiatric concepts.

CONCLUSION

The issue of the tort liability of mentally ill and mentally deficient persons depends on considerations of tort theory, social policy, and the realities of mental disease in our society. At present the social policy of holding liability dominates in the common law courts of this country. The tort theory of responsibility in this area is not as yet resolved, however, while the realities of mental disease are not clearly presented or understood. Until such time as these factors have been measured and evaluated in the decisions, the future course of liability must be considered uncertain.